UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of	*	
	*	
BOSTON COLLEGE GRADUATE EMPLOYEES UNION – UNITED AUTO WORKERS	*	
	*	
Petitioner	*	Case No. 01-RC-194148
	*	
and	*	
	*	
	*	
BOSTON COLLEGE	*	
	*	
Employer.	*	
	*	

EMPLOYER'S OPPOSITION TO MOTION TO INTERVENE AND FOR RECUSAL

I. INTRODUCTION

The Graduate Workers of Columbia-GWC, UAW ("GWC-UAW") seeks to intervene in this matter at this late date – nearly seven (7) months after the hearing before the Hearing Officer, nearly two (2) months after Boston College's filing of its Request for Review and over one (1) month after the election – for the sole purpose of filing a motion to recuse Board Member Marvin E. Kaplan. GWC-UAW argues that Member Kaplan should recuse himself from participating in the issues presently before the Board, including the issues raised by Boston College in its Request for Review.

GWC-UAW's motion is an obvious strategic attempt to preclude the entire Board from reconsidering its controversial decision in *Columbia University*, 364 NLRB No. 90 (2016), where the Board departed from *Brown University*, 342 NLRB 483 (2004) and held an employment relationship can exist under the National Labor Relations Act (the "Act") between a

college or university and its graduate students. GWC-UAW's attempt to intervene at this late stage in the proceedings should be denied, as no Board rule or regulation supports its argument that it should be made a party to this proceeding. GWC-UAW has failed to establish any interest that would allow it to intervene in this matter. In the unlikely event that GWC-UAW is permitted to intervene, Boston College maintains that there is absolutely no support for GWC-UAW's position that Member Kaplan should be recused from these proceedings.

For the reasons that follow, GWC-UAW's motion to intervene and for recusal should be denied in its entirety.

II. ARGUMENT

A. No Legal Authority Supports Intervention by GWC-UAW.

In its motion, GWC-UAW cites no Board rule or regulation supporting its ability to intervene in this matter. Indeed, there is no basis for GWC-UAW to intervene at this stage in the proceedings. Section 102.65(b) of the Board's Rules and Regulations, which addresses the procedures under § 9(c) of the Act in representation proceedings, provides as follows:

> Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director, or the hearing officer at the specific direction of the regional director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the regional director may deem proper, and such intervenor shall thereupon become a party to the proceeding.[1]

This regulation indicates that intervention can only be permitted for those who have an "interest in the proceeding." GWC-UAW states in its motion that it has an interest in this matter because a decision in this case "may have an impact on the disposition of the Columbia case."

[1] The NLRB Casehandling Manual, Part 2 (addressing representation proceedings) sets forth detailed guidance regarding intervention by labor organizations claiming an interest in representation. This guidance demonstrates that the intervention procedures are designed to allow labor organizations claiming such a representation interest in appearing on the ballot. That is clearly not the case in the present matter.

Motion to Intervene and for Recusal ("Mot.") at 1. If GWC-UAW's argument is accepted, there would be almost no limit to when a party could intervene in any matter, and the term "interest in the proceeding" expressed in § 102.65(b) would be boundless.

If GWC-UAW is found to have an "interest" in this matter simply because a decision here "may" have an "impact" on Columbia, then GWC-UAW necessarily has an "interest" in every single case that will come before Member Kaplan while the Columbia case is still pending, and even thereafter. GWC-UAW says as much in its motion, arguing that Member Kaplan should "recuse himself from cases in which a party is asking the Board to overrule a prior Board holding in the very case that Member Kaplan has recused himself from and in any case in which a decision could dictate the result in Case No. 02-RC-143012." Mot. at 1-2. GWC-UAW's argument thus logically extends to permission to intervene as a party in any proceeding where Member Kaplan might participate in a decision that could affect Columbia. This interpretation of "interest" in § 102.65(b) is so broad that the term would lose all meaning if it is accepted.

GWC-UAW's stated interests are not limited to whether graduate student assistants are "employees" within the meaning of § 2(3) of the Act. GWC-UAW's argument necessarily extends much further and would lead to absurd results. If GWC-UAW is permitted to intervene and become a party to this proceeding, GWC-UAW would presumably be permitted to intervene and become a party in any case heard by Member Kaplan that could *potentially* have *any* impact on Columbia. GWC-UAW could intervene in cases involving the appropriateness of micro-units; the articulation of the joint employer standard; the managerial status of faculty members under the *Pacific Lutheran University,* 361 NLRB No. 157 (2014); the scope of bargainable topics; or any other case of widespread importance before the Board that could potentially alter the existing legal landscape in general and for higher education in particular. This is precisely

what GWC-UAW is asking in its motion, as GWC-UAW states in no uncertain terms that "[a]s Member Kaplan has a conflict of interest that prevents him from deciding any cases involving the Trustees of Columbia University, it would similarly be improper for him to decide a case that could determine the result of the *Columbia* case." Mot. at 2-3.

Moreover, GWC-UAW even states that the pending exceptions filed by Columbia do not presently raise the issue of employee status of the unit employees. Mot. at 4. This makes it even more apparent that GWC-UAW is asking to become a party in any case that could affect Columbia, regardless of whether the issue is presently pending in the Columbia matter. Again, this would not simply be limited to the issue of employee status under § 2(3) of the Act. This necessarily extends to any issue that comes before the Board that will have any effect on Columbia. To read the definition of "interest" in 102.65(b) this broadly would result in the term entirely losing its meaning.

GWC-UAW has made no showing that it has an interest that would allow it to intervene and become a party in this proceeding. GWC-UAW has shown no relationship to any of the parties and no interest in the facts at issue in this matter. Allowing intervention on the premise that a decision on the legal issues involved here might have an effect on the legal issues applicable to Columbia would open the door to intervention in almost any case. GWC-UAW does not have an interest in this matter and its motion to intervene should be denied.

B. No Legal Basis Exists to Recuse Member Kaplan from Participating in a Decision in this Proceeding.

As set forth above, GWC-UAW has no interest in this proceeding and should not be permitted to intervene in this matter. However, if GWC-UAW's motion to intervene is granted, its effort to recuse Member Kaplan should be rejected, as it has no basis in law.[2]

The regulations promulgated by the Office of Government Ethics ("OGE") pursuant to 18 U.S.C. § 208(d)(2) provide the following with respect to financial conflicts of interest: "An employee is prohibited by criminal statute, 18 U.S.C. 208(a), from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him under this statute has a financial interest, if the ***particular matter*** will have a ***direct and predictable effect*** on that interest." 5 C.F.R. § 2635.402 (emphasis added). The term "direct and predictable effect" is defined in 5 C.F.R. § 2635.402(b)(1) as follows:

> (i) A particular matter will have a direct effect on a financial interest if there is a ***close causal link*** between any decision or action to be taken in the matter and any expected effect of the matter on the financial interest. An effect may be direct even though it does not occur immediately. ***A particular matter will not have a direct effect on a financial interest, however, if the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter***. A particular matter that has an effect on a financial interest only as a consequence of its effects on the general economy does not have a direct effect within the meaning of this subpart.
>
> (ii) A particular matter will have a predictable effect if there is a ***real, as opposed to a speculative possibility*** that the matter will affect the financial interest. It is not necessary, however, that the magnitude of the gain or loss be known, and the dollar amount of the gain or loss is immaterial.

5 C.F.R. § 2635.402(b)(1) (emphasis added).

[2] Boston College reserves the right to fully brief these recusal issues and/or supplement the arguments contained herein if GWC-UAW is permitted to intervene.

In its motion, GWC-UAW relies on the OGE regulations addressing "appearance" conflicts, which provides in relevant part: "Where an employee knows that a particular matter involving specific parties is ***likely to have a direct and predictable effect*** on the financial interest of a member of his household . . . and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter, the employee should not participate in the matter unless he has informed the agency designee of the appearance problem and received authorization . . . ." 5 C.F.R. § 2635.502(a) (emphasis added). The term "direct and predictable effect" contained in 5 C.F.R. § 2635.502(a) has the same meaning as set forth in 5 C.F.R. § 2635.402(b)(1). *See* 5 C.F.R. § 2635.502(b)(2).

GWC-UAW has failed to establish how Member Kaplan's participation in this matter would have a "direct and predictable effect" on any financial interests held by Member Kaplan or his wife. The mere fact that Member Kaplan has chosen to recuse himself from cases directly involving Columbia University *does not mean* that such recusal must extend to any and all NLRB cases that *might affect* Columbia University as an employer in some way. Nowhere in its motion does GWC-UAW even remotely articulate a "close causal link" between a decision in this case and the effect of that decision on Member Kaplan's wife's employment at Columbia.[3] On the contrary, GWC-UAW's motion is replete with contingencies, speculation and an astoundingly attenuated chain of events, each of which would need to occur in order for there to be any possibility for there to be some theoretical – and presently unknown – effect on Member Kaplan's financial interests.

[3] GWC-UAW's motion does not identify what Member Kaplan's wife's role is with Columbia. Member Kaplan originally indicated that his wife works at Columbia University Hospital and subsequently amended the disclosure to state that his wife's employer is the Trustees of Columbia University.

GWC-UAW states that ***if*** review is granted in this matter regarding the issue of whether graduate student assistants are "employees" under the Act, the *Columbia* case "***may be affected***." Mot. at 4. Even though the employee status issue is not presently pending in *Columbia*, GWC-UAW speculates that ***if*** a decision overruling *Columbia*'s holding regarding graduate student assistants is reached, Columbia "***can be expected***" to ask the Board to dismiss the petition in that case. *Id.* ***If*** the Board finds merit in the objections filed in *Columbia*, GWC-UAW states, the employee status issue would be relevant to whether a new election should be ordered. *Id.* at 4-5. This string of events that GWC-UAW relies upon is quite the opposite of the requirement that there be a "direct and predictable effect" on any stated financial interests.

Additionally, even if each and every one of these contingencies materialize, GWC-UAW cites no "financial interest" held by Member Kaplan or his wife that would be benefitted by the occurrence of all of these events. The only fact presently known about Member Kaplan's wife and the potential financial interests involved is that she is employed by Columbia. GWC-UAW's motion fails to articulate how Member Kaplan or his wife would benefit financially from a decision in this case involving Boston College and Boston College Graduate Employees Union – United Auto Workers.

GWC-UAW's effort to string together layer upon layer of speculation and contingencies plainly shows that there is no "direct and predicable effect" that would require Member Kaplan's recusal. *Cf. Matter of Billedeaux*, 972 F.2d 104, 106 (5th Cir. 1992) (holding with respect to analogous regulation addressing judicial recusal that "a 'remote, contingent, or speculative' interest is not one 'which reasonably brings into question a judge's partiality'"). If permitted to intervene, GWC-UAW's position that Member Kaplan should be recused from this matter is without merit.

A similar effort to manufacture a basis for recusal based upon mere speculation was rejected in *Sensley v. Albritton*, 385 F.3d 591 (5th Cir. 2004). In *Sensley*, the plaintiffs argued that the federal judge presiding over a petition challenging proposed redistricting should have recused himself. The plaintiffs' argument was based on the fact that the judge's wife was an assistant district attorney in the office of the district attorney, and that the district attorney represented the defendants in the case. *Id.* at 598. The plaintiffs contended that the judge, through his wife, would stand to "indirectly" benefit from the outcome of the case, pointing to the judge's wife's "position as an at-will employee" in the district attorney's office. *Id.* at 599. The plaintiffs argued that this status created an incentive for her to ensure that the district attorney was successful in the case, and that a threat to her job security would have an effect on the judge's partiality in deciding the case. *Id.* at 599-600.

In upholding the trial court's decision that the judge was not required to recuse himself, the Fifth Circuit stated the following:

> [The plaintiffs] do not contend that the outcome of this case will directly affect any interest—financial or other—of Judge James or his spouse. Instead, they argue that the outcome of the case could ***possibly have an indirect impact*** on Mrs. James's ongoing status as an employee at the district attorney's office. However, ***they are only able to make this argument by layering several speculative premises on top of one another to reach a speculative conclusion***: if District Attorney Levy loses this case, it *might* adversely affect his political popularity; and if it adversely affects his political popularity, he *might* lose his next election; and if he loses his next election, Mrs. James *might* lose her job if the new district attorney chose not to retain her. ***This edifice of conjecture will not support an objective conclusion that Judge James has a financial interest in the outcome of this case***.

Id. at 600 (emphasis added).

Similarly, in the present matter there can be no objective conclusion that Member Kaplan has a financial interest in the outcome of this case that would require his recusal. Even if GWC-UAW's series of speculations were accepted as true, GWC-UAW has not shown how Member

Kaplan or his wife would benefit financially from a decision in this case. *See also In re Placid Oil Co.*, 802 F.2d 783, 786–87 (5th Cir. 1986) (rejecting an argument that the judge's investment in a Texas bank should result in the judge's recusal due to the fact that his ruling "will have a dramatic impact on the entire banking industry," as the petitioners had merely shown "an indirect and speculative interest," and a "remote, contingent, and speculative interest is not a financial interest within the meaning of the recusal statute . . . nor does it create a situation in which a judge's impartiality might reasonably be questioned").[4]

Additionally, the case law cited by GWC-UAW does not support its position that Member Kaplan should be recused from these proceedings. GWC-UAW cites *Shell Oil Co. v. United States*, 672 F.3d 1283 (Fed. Cir. 2012) in support of its argument that recusal is warranted. GWC-UAW's reliance on *Shell Oil* is misplaced, as that case is entirely distinguishable from the instant matter.

Shell Oil involved a lawsuit brought by four oil companies against the federal government for the reimbursement of cleanup costs for the dumping of hazardous materials at a waste site in California. *Id.* at 1285. During World War II, the federal government had entered into contracts with the oil companies for the production a certain type of gas that increased the production of hazardous waste, which was dumped at the site. *Id.* Several decades later, after years of litigation, the oil companies were held liable for the cleanup costs for the dumping of the hazardous waste. *Id.*

[4] Moreover, as noted by the Eighth Circuit, courts "are reluctant to fashion a rule requiring judges to recuse themselves from all cases that might remotely affect nonparty companies in which they own stock. We believe such a rule would paint with too broad a stroke. By way of example, a judge holding stock in General Motors should not have to recuse from a case involving Ford Motor Company because some ruling he may make might be used as persuasive authority in a case against GM. . . . As a general matter, the administratively daunting task of identifying such tangential 'interests' outweighs any benefit of eliminating the remote possibility of consequential bias." *In re Kansas Pub. Employees Ret. Sys.*, 85 F.3d 1353, 1362 (8th Cir. 1996).

The oil companies then sued the government for reimbursement of these costs. *Id.* The court granted the four oil companies' motion for partial summary judgment on liability. *Id.* at 1286. The four oil companies then moved for summary judgment with respect to the amount of recoverable damages, and the court entered final judgment awarding damages to each of the four companies. *Id.* Subsequently, the judge presiding over the case informed the parties that when he was entering final judgment, he realized that his wife owned stock in the parent company of two of the plaintiff oil companies. *Id.* He recused himself from the case as to those two plaintiffs, vacating those awards and reassigning the issues pertaining to those two plaintiffs to another judge. *Id.*

The Federal Circuit ruled that the judge was required to recuse himself from the entire proceeding, not just as related to those two plaintiffs. *Id.* at 1290. The court's decision was based on its interpretation of 28 U.S.C. §455(b)(4), which governs the disqualification or recusal of federal judges. *Id.* at 1289-91. Specifically, the decision analyzed the provision in the statute stating that recusal is required where a judge "knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding." *Id.* at 1289. The analysis then turned on the "divestment" exception contained in § 455(e), which provides that recusal can be avoided where a judge or spouse "divests himself or herself of the interest that provides the grounds for the disqualification." *Id.* at 1290. The court found the exception inapplicable, stating that there was "no indication that Congress intended to create an exception whereby a judge can sever or 'divest' certain parties from the case to resolve a conflict . . . . ***This is particularly true where, as here, there is substantial overlap with respect to the issues involved in the remaining parties' claims, and the matters had been considered jointly throughout the proceedings***." *Id.* at 1291 (emphasis added). The court stated that since the

relevant contracts at issue among the four oil companies "contain substantially similar language and the facts relating to dumping waste at the . . . site are nearly identical as to all four companies, the judgment here could have a preclusive or prejudicial effect in the severed case." *Id.* at 1293.

The present matter is entirely distinguishable from *Shell Oil*. The four oil companies in *Shell Oil* were inextricably intertwined for years of litigation stemming from the same factual issues – namely, the dumping of hazardous waste at a specific site and whether the federal government should reimburse the companies for the cleanup costs. The companies collectively brought suit against the federal government under the same legal basis. The companies filed summary judgment regarding liability together, after which they filed summary judgment regarding damages together. The legal and factual issues surrounding these four oil companies and their lawsuit against the government were nearly identical throughout the entire proceeding.

In contrast, the present matter involves Boston College and the Boston College Graduate Employees Union – United Auto Workers. Boston College is not aware of any factual overlap between Boston College and Columbia.[5] These are entirely different parties, with different categories of graduate student assistants who are earning their degrees at two completely different universities. GWC-UAW's argument that, as in *Shell Oil*, Member Kaplan's participation in this matter "could ultimately have a controlling impact on further proceedings in the *Columbia* case"; *see* Mot. at 7; ignores the reality that this case involves distinct parties, a distinct factual background and no financial interest held by Member Kaplan related to Boston College or the Boston College Graduate Employees Union – United Auto Workers.

[5] Indeed, as stated *infra*, part of the basis for Boston College's Request for Review are the differences between Boston College's graduate student assistants and the graduate student assistants at issue in *Columbia*.

These critical distinctions were actually addressed in case directly related to *Shell Oil*. In *Exxon Mobil Corp. v. United States,* 110 Fed. Cl. 407, 409 (2013), as in *Shell Oil*, the plaintiff oil company sought reimbursement from the government for environmental cleanup costs near its facilities in Louisiana and Texas. Judge Smith – the same judge who presided over *Shell Oil* – presided over *Exxon Mobil*, and granted the plaintiff's partial motion for summary judgment. *Id.* The government subsequently filed a motion for recusal, asserting that the financial conflict in *Shell Oil* created an appearance of partiality in the *Exxon Mobil* case because the cases were "directly related" under RCFC 40.2(a)(2)(B). *Id.*

The court rejected the government's argument, holding that *Shell Oil* "cannot be read for the proposition that the interest at issue here creates a conflict of interest that mandates recusal under the statute. ***The case at hand involves a different fact pattern, and different parties than that in the Shell matter. Additionally, there is no interest in ExxonMobil being held by the judge or his wife. Thus, there is no conflict of interest requiring recusal***." *Id.* at 415 (emphasis added). This same reasoning applies to GWC-UAW's present motion. In fact, the overlap between the *Shell Oil* and *Exxon Mobil* cases – similar contract language, the same hazardous waste and dumping issues, and the same defendant, among other issues – was much more extensive than the merely analogous legal issues shared between the Boston College and Columbia matters.

There are also several issues presented in Boston College's Request for Review that differ significantly from the issues in *Columbia*. GWC-UAW's statement that Boston College "proffer[s] the same arguments presented by Member Kaplan's wife's employer in the *Columbia* case" is completely erroneous and is a misrepresentation of what has occurred in these proceedings. While the employee status issue was presented in both cases, Boston College has

also argued throughout these proceedings that the Board lacks jurisdiction over it under the First Amendment. As detailed in its Request for Review, Boston College maintains, among other arguments, that the *Pacific Lutheran University*, 361 NLRB No. 157 (2014) and *Saint Xavier University*, 365 NLRB No. 54 (2017) decisions applied by the Regional Director are not the appropriate tests to apply to graduate student assistants; that these decisions are inconsistent with the religious exemption recognized by the United States Supreme Court in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); that the Board should apply *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002); and that even if *Pacific Lutheran* and *Saint Xavier* were applied, Boston College is exempt from the Board's jurisdiction. Indeed, the majority of the hearing before the Hearing Officer and a significant portion of Boston College's post-hearing brief related to these arguments.

Moreover, Boston College has presented extensive facts and argument regarding its position that Boston College's graduate student assistants are distinguishable from the graduate student assistants in *Columbia*. Testimony was presented on this issue during the hearing and Boston College's Request for Review identifies significant differences between Boston College and Columbia.

Thus, GWC-UAW's assertion that the "same arguments" are presented in this matter and in *Columbia* is false. Many of Boston College's arguments are entirely distinguishable from those presented in *Columbia* and provide additional compelling grounds for the Board to grant its Request for Review and find that the Board lacks jurisdiction over it. The Board may grant review based on one or more of these issues. There is no support for GWC-UAW's assertion that Member Kaplan should be recused based on the employee status issue, but even if there

were, there is clearly no basis for his recusal regarding these other issues that have absolutely no relationship with Columbia.

III. CONCLUSION

For the reasons set forth above, the Board should deny GWC-UAW's motion to intervene and for recusal in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2017, a true and accurate copy of the above document was served by:

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